

TORTOISE COMMUNICATIONS

IBLA 86-1589

Decided November 2, 1988

Appeal from a decision of the District Manager, California Desert District, Bureau of Land Management, adjusting the rental rate for communication site right-of-way CA-6482.

Set aside and remanded.

1. Appraisals--Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communications sites, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of the other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

2. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rent--Rights-of-Way: Generally

Under 43 CFR 2803.1-2(b), a reduction or waiver of the rental rate for a right-of-way may be granted when the holder of the right-of-way provides without charge, or at a reduced rate, a valuable service to the public.

APPEARANCES: Edward Tipler, Ridgecrest, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LYNN

Tortoise Communications (appellant) has appealed from a June 25, 1986, reappraisal decision by the District Manager, California Desert District, Bureau of Land Management (BLM), increasing the rental rate for communications site right-of-way CA-6482. The June 25 decision provided for a rental rate increase for appellant's El Paso Peak site from \$500 to \$4,000 annually, effective May 14, 1987, for a 1-year period.

The right-of-way is located on El Paso Peak in the NW¹/₄, sec. 29, T. 28 S., R. 40 E., Mount Diablo Meridian, Kern County, California. It was

originally granted to appellant on May 14, 1980, for a 10-year period, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1761 (1982). BLM's decision granting the right-of-way permitted the "[c]onstruction, operation, and maintenance of a communication site." The decision which granted the right-of-way noted that the holder of the right-of-way, by its acceptance, agreed to be subject to the applicable regulations contained in 43 CFR 2801-2802.5 and Subpart 2811.

On May 15, 1985, BLM completed an appraisal of the estimated fair market value rental of the right-of-way in accordance with 43 CFR 2803.1-2(d) (1985). Based upon the appraisal BLM issued its June 25, 1986, decision setting the rental at \$4,000 per year beginning May 14, 1987, the anniversary date of the lease.

Appellant proposes that a fair rental value for the site would be \$1,000 per year, plus 5 percent of its gross income from the site, with a cap of \$4,000. It reaches this conclusion by requesting that BLM consider such factors as the relative sizes of the three sites on El Paso Peak; the low user population in the Ridgecrest, California, area; the minimal disturbance to the visual environment caused by its facilities; the intensity of its use of the site; and the fact that it provides several public services for no charge. ^{1/} Appellant further "propose[s] that the Government put itself in a position of supporting the development of private industry" (Statement of Reasons at 6).

[1] Under section 504(g) of FLPMA, 43 U.S.C. | 1764(g) (1982), the holder of a right-of-way is required to pay annual advance rental equal to the fair market value of the right-of-way. An appraisal of fair market value for a communications site right-of-way will not be set aside on appeal if the appellant fails to show error in the appraisal methods used by BLM or fails to show by convincing evidence that the charges are excessive. Denver & Rio Grande Western Railroad Co., 101 IBLA 252 (1988); Mesa Broadcasting Co., 94 IBLA 381 (1986); Miller's Custom Work, Inc., 94 IBLA 261 (1986); Jancur, Inc., 93 IBLA 310 (1986).

The appraisal BLM used in determining the rental rate increase for appellant's right-of-way was recently considered in Communications Enterprises, Inc., 105 IBLA 132 (1988), a case involving another rental rate increase for an EL Paso Peak communications site right-of-way. In Communi-cations Enterprises we determined that the facts and analysis involved in BLM's appraisal were not sufficiently complete to allow us to conclude that the appraisal was supported by the record. In reaching this determination, we especially noted the lack of analysis of the effect on the fair market

^{1/} Appellant states that it provides at no charge a repeater, space, antennas, and power for the local Civil Air Patrol; space for two ham radio repeaters and a computer packet ham station that might become essential in the case of a natural disaster such as volcanic eruption at Mammoth Lakes or within the Inyo county areas north of Ridgecrest; and space for two FM translators relaying stations from Bishop and Riverside which provide highway and weather information important to travelers crossing the desert.

value of the El Paso Peak sites caused by the fact that these sites have a much smaller service area population than the comparables.

The present case is governed by the same analysis as that set forth in Communications Enterprises, supra, and must, therefore, also be set aside and remanded for further consideration.

[2] Appellant also argues that it should be allowed to operate at a reduced rate. The circumstances under which a communications site may be operated under a reduced fee or no fee are set forth in 43 U.S.C. § 1764(g) (1982) and 43 CFR 2803.1-2(b). Section 1764(g) provides for issuance at less than fair market value: "Rights-of-way may be granted, issued, or renewed * * * to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary." This language is tracked in both 43 CFR 2803.1-2(c)(3) (1985), which was in effect at the time the June 25, 1985, decision was issued, and in the present 43 CFR 2803.1-2(b)(2)(ii).

Appellant has alleged that it provides without charge several valuable benefits to the public. Because the record contains no evidence that BLM considered whether or not appellant was providing a valuable benefit to the public such that it warranted a reduced or waived rental rate, on remand BLM is directed to consider that question as well. 2/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded.

Kathryn A. Lynn
Administrative Judge
Alternate Member

I concur:

David L. Hughes
Administrative Judge

2/ BLM is referred to the following authorities governing this issue: Jim Doering, 91 IBLA 131 (1986) (a for-profit business whose principal source of revenue is from subleasing communications facilities is not entitled to a reduction of rental rate merely by providing a service to Government agencies at its regular charge); and New Mexico Broadcasting Co., 60 IBLA 163 (1981) (a commercial broadcaster is not entitled to a reduction merely by providing improved television reception at no increase in price).